78-1016

IN THE
Supreme Court of the United States
October Term, 1978
No.

DAVID GREENBERG,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays to this Court for a writ of certiorari to the United States Court of Appeals for the second Circuit as follows:

A.
OPINION BELOW

The United States Court of Appeals for the Second Circuit by a judgment entered the 28th day of November, 1978, affirmed a judgment in the United States District Court, Eastern District of New York, convicting petitioner of violations of Title

18 United States Code, Sections 1001 and 1503, after a jury trial before the Hon. Edward Neaher.

The conviction was unanimously affirmed.

B.
THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28 Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on November 28, 1978 as aforesaid. A copy is reproduced as Appendix A to this petition.

C.
THE QUESTION PRESENTED FOR REVIEW

1. Is a prima facie case made for violation of 18 U.S.C. 1001 by proof that appellant submitted false documents to the Small Business Administration as proof of disbursement of an SBA loan, without proof that such documents were capable of influencing an SBA function?

2. Will a criminal prosecution lie for a breach of an SBA loan agreement, for disbursement of the proceeds in a manner other than as authorized?

3. Is a prima facie case for obstruction of justice made out without proof that the person allegedly intended to be corrupted intended to be a witness in a Federal proceeding at the time?

4. Was petitioner denied a fair trial by collateral evidence that he allegedly comitted perjury, for which he was never indicted, at a State court trial?

D.
THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Statutes involved are Title 18 United States Code Sections 1001 and 1503.

The pertinent portions are set forth in Appendix B of this petition.

E.
A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Preliminary Statement

Petitioner, David Greenberg, appealed from a judgment of the United States District Court for the Eastern District of New York (Hon. Edward Neaher, United States District Judge) entered on August 18, 1978 convicting him, after a trial by jury of violation of Title 18 United States Code Sections 1001 and 1503 and sentencing him to consecutive one year terms and imposing a fine in the sum of ten thousand dollars ($10,000).

2. Evidence Adduced During The Trial of This Matter.

Petitioner, 34 years of age at the time of the trial, had been a New York City police officer for nine years and together with Patrolman Robert T. Hantz, made up the team known as "Batman and Robin" for their daring and heroism in combatting crime and particularly narcotics traffic. Their deeds inspired two books that narrated their exploits, a successful spinoff movie entitled "The Supercops" and a television series that continues to enjoy high rating, "Starsky and Hutch."

Petitioner's bold challenge to the underworld resulted in at least five assassination attempts on his life. Indeed, his home in Staten Island was shot up, while his wife and daughter were in-

side. The family had no choice but to move as a safety measure and concern for his wife and child induced him to take up residence in an apartment.

Both officers earned royalties from the literary productions of their adventures. Hantz remained on the police force. Petitioner resigned to run for public office and was ultimately elected to the New York State Assembly.

Petitioner also began to invest his newly acquired money in apartment houses. It is one particular investment in garden apartments at 2206-22 Cornaga Avenue and 2205-11 Loretta Place, Far Rockaway, New York that led to the prosecution at bar. In the summer of 1975, petitioner purchased the property with Pete and Vivian Chiarelli, two friends of ten years standing. The Chiarellis invested thirty thousand dollars in cash for their interest. The property was taken in the corporate name, Cornega Avenue Realty, Inc., later amended to Cornaga Avenue Realty Inc.

In September of 1975, a hurricane caused extensive damage to the Rockaways. The Cornaga property suffered its share from the storm. On September 26th, the location was declared a disaster area. Owners of damage property thereby became eligible for Small Business Administration disaster loans.

An application for such loan was made on November 3, 1975 by Cornaga Avenue Realty, Inc., which was signed and personally guaranteed by petitioner. The damage to the property was inspected and verified by William Grant Tullar, in the employ of the SBA.

On February 13, 1976, the SBA authorized a loan in the sum of $86,000 for repairs to the property. On the 30th day of April, 1976, Stephen Bruce Gale, a damage verifier for the SBA, made a progress examination of the premises.

The SBA loan was conditioned that the proceeds be used to repair the damages which the applicant represented were caused by the storm. The loan authorization, which petitioner signed, recites as follows:

"In order to satisfy the requirements of the Small Business Act of 1958 as amended, and the regulations promulgated thereunder and to induce SBA to continue to allow the use of the funds provided to me as disaster relief, I do hereby certify that I have used the disaster funds provided only as authorized by the loan authorization agreement.

"I am aware that any person who knowingly makes a false statement or a misrepresentation by use of this certificate shall be subject to a fine of not more than $5,000. I am also aware that public law 92-385 provides that on all disaster loans made after August 16, 1971, anyone who wrongfully misapplies the proceeds of a disaster loan shall be civilly liable to the administrator in an amount equal to one and a half times the original principal amount of the loan.

"I realize that we may be called upon to document our use or any use of the SBA disaster fund.

"Accordingly, I will retain all documentary evidence, paid bills, cancelled checks and/or invoices of our expenditures or any expenditures for a period of not less than three years from the date of this certification. I will make them available to SBA promptly upon request.

The moneys were disbursed by the SBA to Cornaga as follows:

February 13, 1976	$20,000
April 4, 1976	$34,100
May 12, 1976	$31,900

The installments to repay the loan have all been met without default.

On April 29, 1976, petitioner submitted to the SBA statements which petitioner represented to be bills reflecting payments made to P. McHale Roofing Company, Abilene, Inc. and R.H. Construction in the respective sums of $20,760, $21,000 and $31,191.

Donald Zinkhem had been the superintendent of 1602 Cornaga Avenue. He testified that he quit his job August of 1976 while petitioner testified he fired him for dishonesty.

Three weeks after leaving Cornaga, Zinkhem made a complaint to the FBI that he suspected petitioner of foul play in his use of the SBA loan and certain bank moneys.

As a result of the investigation started by Zinkhem, on the 7th day of February, 1977, petitioner, Pete Chiarelli and his wife, Vivian, were served with subpoenas to testify before a Federal Grand Jury.

As soon as Pete and Vivian Chiarelli were served with the subpoenas they telephoned petitioner, told him about the subpoenas and asked him to come to their home in order to prepare a defense to the investigation, which all three clearly were targets. The three of them conferred in the Chiarelli home while a concealed tape recorder set up by Pete Chiarelli caught their conversation. A few days later, a "script" was prepared in the handwriting of petitioner reciting therein how the three of them will handle the facts. Vivian Chiarelli stated that she felt the Government could make out a criminal case against her and her husband.

(a) The case against petitioner for allegedly submmitting false documents to the SBA, in violation of 18 U.S.C. 1001.

Pete Chiarelli and Vivian Chiarelli were partners with petitioner in the Cornaga Garden aparemtns. Title was originally taken in the name of a corporation, Cornega Avenue Realty, Inc., spelled with an "e." Vivian was the president of the corporation, Pete, the vice-president and petitioner, the treasurer. Pete and Vivian took an active role in the operation of the business and enjoyed profits therefrom. Thus, the business purchased a 1976 Mercury Monarch for Pete. Cornaga made a $290 payment by check to PVC, a store owned by Vivian. The corporation made payments to Brooklyn College for tuition expenses for the daughter of the Chiarelli's. Pete arranged for repairs to be done on the property. Both Vivian and Pete had authority to write and sign corporate checks. Pete and Vivian both collected rents. Corporate mail came to their home.

Pete and Vivian were made aware by petitioner that he was going to make application for an SBA disaster loan. A new corporation, Cornaga Avenue Realty, Inc., with an "a" was formed to take the SBA loan, to conceal the interest of the Chiarelli's because of their poor credit standing.

According to the testimony of Pete and Vivian Chiarelli, the purpose of the loan was to draw out their investment rather than to repair the hurricane damage.

The indictment charged in Count One that petitioner submitted to the SBA "bills reflecting payments made by him to P. McHale Roofing Company, Abilene, Inc. and R.H. Construction in the respective sums of $20,760, $21,000 and $34,191 for repair services on property located at 1106-2222 Cornaga Avenue and 2205-2211 Loretta Road, Far Rockaway in accordance with the terms of the aforementioned loan, whereas in truth and in fact, as the defendant then knew, the aforementioned sums had not been paid to P. McHale Roofing, Abilene, Inc. and R.H. Construction for such services.

Frances P. McHale, a self-employed roofer, testified that he worked on the roofs of three buildings and was paid $700 for concrete work, but never presented a $20,760 bill to petitioner, nor was ever paid such sum. However, he was unable to explain how petitioner managed to get his printed bill. He also conceded he does not pay income tax. Petitioner testified that McHale was paid the full $20,700.

Sidney Soloman, president of Abilene, Inc., a fuel oil distribution and oil burner repair firm, testified that Cornaga was a customer of the firm for fuel oil. He gave Cornaga, an estimate for installation of two boilers at 2206 Cornaga Avenue at a price of $14,900 per boiler. However, he never did the work.

The witness testified that the $21,000, bill submitted to the SBA had been altered. The name of the proposed burner was changed from "Iron Foreman" to "Carlin." Figures, the signature and the notation of payment were added to the estimate, without his authorization.

Solomon testified that on April 5, 1976, he was paid by petitioner $8,000 for oil. He testified that petitioner gave him a $21,000 check, but he gave him an exchange check for the difference in the amount of $12,985.52.

Richard Berger, president of Queens Boiler Repair testified that he installed two new boilers in November of 1975 and did pipe work on May of 1976, for which he was paid $4,860 and $1,593 respectively. However, he testified that his bills were sent to Pete Chiarelli. Petitioner testified that it had been his belief that it was Abilene that had installed the boilers.

G. Holland, employed by the Citibank branch at Avenue J and East 13th Street, testified that on the 19th day of March, 1976, an account was opened in the name of Robert Holloway, d/b/a R.H. Construction Co. The signature card indicated that Robert Holloway and Harry Bond were authorized to sign checks and Holloway's signature was verified by petitioner.

The account was closed in April of 1976, by issuance of a bank check in the sum of $39,171.39, which was deposited in the account of David Greenberg Enterprises.

Frances Tinger, employed by State-Fon Corporation, a private telephone service, testified that on March 18, 1976, Robert Holloway of R.H. Construction, opened an account for telephone answering service and a mailing address.

Pete Chiarelli testified that there was never a Robert Holloway, not an R.H. Construction Co. Chiarelli masqueraded as Holloway. On May 16, 1976, he applied to the County Clerk for a certificate to do business in the name of Robert Holloway d/b/a R.H. Construction. He masqueraded as Robert Holloway in opening the account at Citibank and petitioner's brother Bruce, masqueraded as Harry Bond. He deposited checks given to him by petitioner in the account. When he received a telephone call from Citibank that they were closing the account, he directed the bank to mail the close-out check to the mailing address. He deposited Cornaga Avenue Realty checks endorsement, Robert Holloway. He was the one,

who deposited the $12,985.52 Abilene exchange check into the R.H. Construction account. However, he insisted that the Robert Holloway plot was masterminded by petitioner. However, Pete admitted that he drew Cornaga checks in the sums of $1,830, were allegedly used for payroll.

Vivian Chiarelli corroborated her husband that petitioner had gotten him to masquerade as Robert Holloway, doing business as R.H. Construction and that there was no such form or person.

Charles Garelick testified for the defense. This twenty year old college student testified that in 1976, petitioner sent him to Pete Chiarelli in Far Rockaway to put him to work on Greenport Road property, eight blocks from the Cornaga property. There he met Bob Holloway. He was introduced by Pete, who asked Holloway to put him to work.

Later, he collected rents at Cornaga. When Holloway left for California, Pete had Garelick open an account in Manufacturer's Hanover Trust Company. Garelick was then masquerading as Holloway.

Bruce Greenberg, petitioner's brother, testified that he worked at the Greenport Road property, under the name of Harry Bond, since he was on disability at the time and did not want to use his real name. He met Holloway on the job. He went to Citibank with Pete Chiarelli and signed the card authorizing his signature as Harry Bond on checks of the R.H. Construction account. He knew Holloway to be the boss of R.H. Construction.

Toby Schechner, a friend of petitioner's as well as Pete and Vivian Chiarelli, testified that she had introduced Lennie Joiner to Pete, to sell the latter slag. When Lennie complained to her that Pete did not pay the bill, she drove out to the Cornaga property to talk to Holloway, who had a constracting firm known as R&H Contracting.

Holloway moved into her apartment, where they lived together from March to April of 1976. Holloway complained of

some difficulty with his wife and two children in California. He made a telephone call to California and took off. She turned the phone bill, listing the call, over to a federal agent.

Petitioner testified to his dealings with Holloway and that he had paid R.H. Construction in full for the bill Holloway gave him. He had hired Holloway because his bid was lower for the repairs, since the SBA did not allow the full amount for which he applied.

The following witnesses testified to the excellent reputation of petitioner for truth and honesty: Herbert L. Wilson, James Connaughton, Jacqueline Connaughton, William T. Bellard, a New York County Supreme Court Justice, Stephen Cantor, Lance Mandelbaum, Frank C. McDernott, Lila Yagerman, Robert T. Hantz, petitioner's former partner known as Robin" of the "Batman and Robin" team, Aaron Bernstein, a New York Civil Court Judge.

(b) The case against Petitioner for allegedly obstructing justice in violation of 18 U.S.C. 1001.

On February 7th, 1977, Pete and Vivian Chiarelli and petitioner were served with subpoenas requiring their testimony before a Grand Jury. They promptly telephoned petitioner to come to their home to prepare a defense concerning this investigation, where all three were obvious targets. The three conferred in the Chiarelli home, while a concealed microphone planted by Pete Chiarelli caught the conversation. A few days later, a "script" was prepared in the handwriting of petitioner reciting therein how the three of them will handle the facts and particularly, Bob Holloway. Vivian Chiarelli stated that she felt the Government could make out a criminal case against her and her husband. Pete Chiarelli testified that petitioner told him that there is a Bob Holloway when he knew this was not true. This conversation was recorded. A few days later petitioner wrote out a script for him stating, inter alia, that Holloway authorized Pete to open the Citibank account and that Pte does not remember who opened the mail and phone account. He

testified that "Dave had a conversation with my wife and they said a guy they were going to say—was Bob Holloway. There used to be a blond fellow with an Afro and Dave said he got run over in California." Vivian suggested that they say the bank misstook Pete for Holloway and that she and Pete claim they do not remember incidents.

Petitioner testified that he warned them not to lie before the Grand Jury.

On February 11, 1977, Pete and Vivian Chiarelli answered the subpoena and requested an adjournment to retain counsel. On February 18, 1977, they again appeared before the Grand Jury, asserting their privilege against self-incrimination and refused to testify.

They refused to either testify or to turn over tapes they had made of conversations with petitioner until almost one year later, January 13, 1978, when Herbert Lyons, their new counsel, managed to negotiate an agreement for immunty for them in consideration for their cooperation against petitioner.

Their first lawyer suggested that Pete plead guilty to a misdemeanor, which advice they declined. Vivian Chiarelli testified that she lied to an FBI agent, telling him she knew nothing of repairs to the Cornaga property and of petitioner's financial affairs and she denied any partnership with petitioner. Her explanation was her fear about implicating her husband and herself.

F.
THE BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crimes charged was a violation of Federal Law, to wit: Title 18 United States Code, Sections 1001 and 1503.

G.
ARGUMENTS AMPLIFYING THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

POINT ONE

THE EVIDENCE AGAINST PETITIONER FOR VIOLATION OF 18 U.S.C. 1001 WAS INSUFFICIENT TO SUPPORT A CONVICTION

A. The Government failed to Prove that the False Documents Allegedly Filed by Petitioner Were Material in Sense that They Were Capable of Affecting or Influencing A Governmental Function.

The indictment charged petitioner with submitting false bills indicting that he had properly applied the loan proceeds pursuant to the SBA authorization. The indictment fails to recite, however, that the alleged fraud was capable of affecting or influencing any governmental function. Nor was any proof introduced by the Government that what was charged to petitioner was capable of influencing any SBA action. Therefore, there was no proof offered by the Government that the documents were material.

Petitioner was not charged with submitting a false application for the loan. The loan had been approved after the property was inspected for damage by an SBA agent. Thus, the proof of expenditures filed by petitioner, whether truthful or false, had no play in the authorization of the loan. Indeed, the loan was authorized on February 13, 1976. No complaint was made that the application for it was fraudulent. The documents that gave rise to this indictment were not filed until April 29, 1976. At most, if the documents were false, they reflect that petitioner breached his contract with the SBA, hardly the type of act for which Congress intended criminal sanctions.

The usual prosecution for violation of 18 U.S.C. 1001 occurs when false statements are submitted in an application made for a loan. *United States v. Mellon* 96 F.2d 462 (2nd Cir., 1938). In such case, it is clear that the statement is capable of affecting or influencing a governmental function. *United States v. Goldsmith,* 108 F.2d 917b (2d Cir., 1940). A false statement in an application for an SBA loan is capable of influencing the agency whether to approve the transaction. However, where the false statement merely concerns the use to which the loan moneys have been put, it is doubtful whether it is capable of influencing any further agency action. At most, it constitutes a breach of contract by the borrower to apply the proceeds of the loan as agreed. Given, the criminal sanctions would not lie for mere deviation in the disbursement of loan moneys from the plan as authorized, it is difficult to reconcile a criminal prosecution for falsely representing how the loan moneys were spent, when the act of deviation from the loan plan, in itself, will not trigger the criminal machinery.

The various circuits have been outspoken in their rejection of a criminal prosecution for filing false statements, where they cannot conceivably influence agency action. Thus, in *United States v. Radetsky,* 535 F.2d 556 (10th Cir., 1976), a conviction for submission of false medical documents where reimbursement is not authorized was reversed, the Court writing:

> "Materiality of the alleged misstatements is an essential element of offenses defined by 18 U.S.C. 1001 . . . There must be sufficient Government proof under the standard applied in criminal cases that the alleged misstatement was material . . .
>
> Since payment was not authorized, any misstatement could not induce payment and was immaterial as a matter of law. . . . The proof must be analyzed to see that there is sufficient evidence that the alleged misstatement was material."

The Second Circuit has defined materiality as capability of affecting governmental function. "The charge of materiality re-

quires only that the fraud in question have a natural tendency to influence, or be capable of affecting or influencing a governmental function. The alleged concealment or misrepresentation need not have influenced the actions of the Government agency and the Government agents need not have been actually deceived." *United States v. Markham,* 537 F.2d 187 (5th Cir., 1976); *United States v. Johnson,* 530 F.2d 52 (5th Circ., 1976).

An analysis of cases in the Second Circuit would seem to indicate a commitment to the rule that the filing of a false report to be actionable must conceivably have potential to influence agency policy. Thus, a false accusation to the FBI that a federal employee solicited a bribe is criminally actionable, since the agency has jurisdiction to act upon the information. *United States v. Adler,* 380 F.2d 917 (2nd Cir., 1967). A conviction was affirmed on a prosecution of a finder, who induced an applicant to file a false application for an SBA loan by concealing his finder's fee arrangement. The SBA would have rejected the loan, if put on notice of the finder's fee arrangement. Therefore, the misrepresentation had a potential for influencing SBA action. *United States v. Rapoport,* 545 F.2d 802 (2nd Circ., 1976).

In *United States v. Rodriguez,* 556 F.2d 638 (2nd Circ., 1977), the Court held that although it need not be alleged in the indictment, the false statements, to be actionable, must be "material and capable of influencing" the agency.

The Government offered no evidence tending to show that the documents filed by petitioner had any potential for influencing SBA action. Thus, there was a failure of proof of an essential element of the crime. Petitioner's motion to dismiss for failure to make out a prima facie case was improperly denied.

B. Due Process of Law Was Violated by the Prosecution of Defendant Criminally for What Was Essentially A Civil Breach of Contract.

Petitioner signed the loan authorization, that required him to spend the proceeds in the manner approved. The loan

authorization put him on notice that any deviation could result in a fine of not more than $5,000, as well as civil liability for an amount equal to one and one half times the original principal amount of the loan.

By using the proceeds other than as authorized, petitioner was guilty of a breach of contract. The false documentation filed by him evidenced his departure from the conditions of the loan.

It is submitted that due process of law is violated by a criminal prosecution for a simple breach of contract. This is especially so, where the contract provisions put the borrower on notice of civil liability for any deviation from the contract provisions.

"The statute (18 U.S.C. 1001) serves as a catch-all, reaching those false representations that might substantially impair the basic functions entrusted by law to the particular agency but which are not prohibited by other statutes." *United States v. Rose,* 570 F.2d 1358 (9th Cir., 1978). However, it is submitted that the statute was not intended to be used to prosecute criminally for a breach of contract.

POINT TWO

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR OBSTRUCTION OF A WITNESS BY REASON OF THE FAILURE OF PROOF THAT THE PERSON ALLEGEDLY OBSTRUCTED INTENDED TO BE A WITNESS AT THE TIME.

On February 7th, 1977, petitioner, Pete Chiarelli and Vivian Chiarelli were served with subpoenas requiring their testimony before a Grand Jury. The record is also clear that whatever illegality had taken place, the Chiarellis were just as guilty as petitioner—if not more. It was Pete Chiarelli who went to the Citibank, masqueraded as Bob Holloway and opened an account in the name of Holloway, doing business as R.H. Construction Company. It was Pete Chiarelli who signed Holloway's name on checks and deposits. And it is this suspicious activity that aroused Justice Department interest. Pete and Vivian Chiarelli felt themselves to be prime targets of the investigation. Vivian Chiarelli said as much.

Pete and Vivian made two tape recordings of conversations with petitioner in 1976, long before the Government had shown any interest in their activities. Why then, would they go to the trouble of taping conversations with their partner? The explanation they offered was that they had invested $30,000 in cash in the Cornaga project, without any papers to prove their interest in the property and they were trying to ferret out tape recorded admissions from petitioner of their investment.

However, they testified that sometime in 1976, they got their investment back. Why then would they telephone petitioner on February 7th, 1977 or a few days later, invite him over their home and tape the conversation, after being served with subpoenas? Certainly, it was not to prove their investment, since they already got it back. Pete Chiarelli offered the incredible testimony that he does not know why they taped this third

conversation, wherein the three parties discussed how to deal with any Government questions concerning Bob Holloway.

It is self-evident that the Chiarellis were taping conversations with petitioner in order to have ammunition to barter with the Government should the maneuverings of the Chiarellis ever result in a criminal prosecution. No other explanation makes sense.

It is quite clear that in February, 1977 when petitioner spoke with his former partners, which talks became the bases for the obstruction of justice charge, witnesses at the Grand Jury proceedings. Indeed, they retained counsel and on February 18th, 1977, they took the Fifth Amendment. Not until the Government gave them immunity in writing on January 13th 1978, almost a year later, did they agree to testify.

An element of the crime of obstruction of justice is proof that the person sought to be corrupted had a present intention at the time of being a witness. "Just as clearly, he is not a witness when, despite his testimonial potential, there is no present prospect of ever exploiting it." *United States v. Jackson,* 513 F.2d 456 (D.C., 1975) The obstruction statute must be strictly construed and without proof that the party intended to be corrupted intended to testify in a pending federal proceeding, a prima facie case is not made out. *United States v. Baker,* 494 F.2d 1262 (6th Cir., 1974). Specific intent to impede the administration of justice is not sufficient. *United States v. Ryan,* 455 F.2d 728 (9th Circ., 1971).

What took place between petitioner and the Chiarellis was the normal preparation of a defense among potential defendants, none of whom had any reason to believe that the others were planning on becoming Government witnesses. Merely because counsel was not present at the time could these conversations be used to make out an obstruction of justice charge. "The Defendant has a right to prepare in secret, seeing and inviting those he deems loyal or those with whom he is willing to risk consultation" In re *Tarkeltoub,* 256 F. Supp. 683 (S.D.N.Y., 1966). It was the Chiarellis who invited petitioner

over when they got their subpoenas. They were the ones who initiated the conversations and made contributions.

The burden was on the Government to produce evidence that in February of 1977, the Chiarellis, despite the subpoenas intended to testify before the Grand Jury. This burden, the Government failed to meet. They were not even asked whether they intended to testify, for the simple reason that all of the evidence pointed to the contrary. On February 18th, 1977, they took one year of negotiations with the Government for immunity, to finally get them to testify on January 13th, 1978. The record is "fatally deficient," where it fails to contain proof that the person attempted to be obstructed "intended" at the time to testify on the federal charges." *United States v. Cotton,* 409 F.2d 1049 (10th Cir., 1969); *Berra v. United States,* 221 F.2d 590 (8th Circ., 1955); *United States v. Walker,* 93 F.2d 792 (8th Circ., 1938).

The court below erred in denying the defense motion to dismiss the indictment for failure to make out a prima facie case.

POINT THREE

COLLATERAL EVIDENCE THAT APPELLANT HAD COMMITTED PERJURY IN A STATE COURT PROCEEDING, ALTHOUGH NOT INDICTED, DEPRIVED HIM OF A FAIR TRIAL.

On cross-examination, defense counsel attempted to establish that shortly after a series of assassination attempts had been made on petitioner's life, petitioner had moved into the Chiarelli home, where he remained until late in 1976. He sought to refresh Pete Chiarelli's recollection by reading to him his testimony in New York County Supreme Court at a hearing ordered in response to an election law action challenging the veracity of petitioner's listed residence in a City Council election. Pete Chiarelli admitted testifying in State Court that petitioner resided in his two family house, but to the surprise of defense counsel, he testified that he lied in State Court and that petitioner did not actually live there. Vivian Chiarelli, also under cross-examination, confirmed that her husband had committed perjury for petitioner in New York County Supreme Court.

On redirect examination of Vivian Chiarelli, the Assistant United States Attorney made an unwarranted attack on petitioner's character by the implication that petitioner committed perjury at the New York County Supreme Court hearing:

> "Q. Now do you recall being asked on cross-examination as to the fact that your husband Peter Chiarelli lied in a Supreme Court proceeding as to Mr. Greenberg living in your home in 1975 when he ran for councilman?
>
> A. That is correct.
>
> Q. Now was David Greenberg present during those court proceedings?
>
> A. Yes, he was.
>
> Q. Did David Greenberg testify that day?
>
> A. Yes, he did.

Q. To your knowledge was David Greenberg indicted for perjury that day?

A. No, he was not."

Defense counsel moved for a mistrial on grounds that the Government had implied by its interrogation, that petitioner had committed a crime of moral turpitude, perjury. The motion was denied, the basis for the Court's ruling being that it was clear that petitioner had not been indicted for such perjury.

"No witness may be impeached by evidence of any prior misconduct or crime of which he has not been convicted." *United States v. Turquitt,* 557 F.2d 464 (5th Cir., 1977). "Witnesses cannot generally be impeached in this circuit by evidence of prior convictions." *United States v. Miles,* 480 F.2d 1217 (2nd Circ., 1973); *United States v. Kahan,* 479 F.2d 290 (2nd Circ., 1973); *United States v. Sposato,* 446 F.2d 779 (2nd Circ., 1971).

Rule 404 (b) of the Federal Rules of Evidence limits the use of evidence of other crimes:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

"The trial judge must first find that the proferred evidence (of other crimes) is relevant to some issue at trial other than show that the defendant is a bad man." *United States v. Williams,* 577 F.2d 188 (2nd Circ., 1978); *United States v. Hockridge,* 573 F.2d 752 (2nd Circ., 1978). Thus, it was held reversible error to allow evidence that defendant had accepted bribes on other occasions, at a bribery trial. *United States v. O'Connor,* 580 F.2d 38 (2nd Circ., 1978).

Petitioner in this case relied strongly on his credibility as a New York State Assemblyman and former honor police officer. He called upon many character witnesses, including two sitting judges in the New York State Court system. For the Government to use redirect examination of Vivian Chiarelli to bring out that petitioner had allegedly committed perjury in a State Court proceeding had to be devastating to the defense. The Court's rationale in denying the motion for a mistrial that petitioner had never been indicted for perjury was error. That was exactly the reason he could not be collaterally impeached with such evidence.

CONCLUSION

THE PETITION FOR CERTIORARI HEREIN SHOULD BE GRANTED.

Dated: Brooklyn, New York
December, 1978

Respectfully submitted,

JACOB R. EVSEROFF
Attorney for Petitioner

JEFFREY A. RABIN, ESQ.
Of Counsel

APPENDICES

APPENDIX A
OPINION OF THE COURT
DATED NOVEMBER 28, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth of November, one thousand nine hundred and seventy-eight.

Present:
HON. J. EDWARD BUMBARD
HON. LEONARD P. MOORE
HON. MURRAY I. GUREFEIN
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID GREENBERG,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel, taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO
Clerk

By: Arthur Heller,
Deputy Clerk

APPENDIX B
SECTIONS 1001 and 1503

18 U.S.C. 1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. 1503 provides:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any witness, in any court of the United States . . . or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years or both."